

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 17 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0154
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RICHARD MICHAEL LONA,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200801581

Honorable Boyd T. Johnson, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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Tucson
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E C K E R S T R O M, Presiding Judge.

¶1 In this appeal from his convictions for leaving the scene of an accident, felony flight, and three counts of aggravated assault, appellant Richard Lona maintains the trial court “improperly restricted” his “rights of discovery and cross-examination” and improperly admitted “irrelevant and incompetent testimony.” Finding no error, we affirm.

Background

¶2 “We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury’s verdicts.” *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In July 2008, Lona fled from a police officer who had attempted to stop him for a traffic violation. Lona’s vehicle collided with another car, injuring the three young men inside. After he hit the other car, Lona left his car and ran out into the desert away from the accident. He ultimately was found hiding under a tree and was arrested.

¶3 After a jury trial, Lona was convicted as noted above, and the trial court imposed concurrent and consecutive, presumptive terms, three of which were enhanced, totaling 9.75 years’ imprisonment. This appeal followed.

Discussion

¶4 Lona first maintains the trial court “improperly restricted” his “rights of discovery and cross-examination” when it ordered that a disciplinary report about a Pinal County Sheriff’s officer, who testified he had been off duty and had observed Lona speeding shortly before the accident, was not discoverable or available for impeachment. The court made the ruling in response to the state’s pretrial request for an in camera

inspection of the report. Because Lona did not object to the court’s ruling below, he has forfeited review for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). And because he does not argue on appeal that any alleged error was fundamental, he has waived fundamental error review as well. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (forfeited argument waived on appeal if fundamental error not argued); *see also State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (appellate court will not ignore fundamental error if it finds it).

¶5 Lona next maintains the trial court erred in allowing the state to present evidence that testing of his urine after the accident had revealed methamphetamine in his body. He argues that because the presence of the methamphetamine did not establish that he had been under the influence of the drug at the time of the offense, the evidence was irrelevant. Lona did not object to the evidence below, and we therefore review only for fundamental error. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

¶6 “Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence . . . and . . . the fact is of consequence in determining the action.” Ariz. R. Evid. 401(a), (b).¹ In this case, to prove that Lona had committed an aggravated assault against the victims, the state was required to show he had “intentionally, knowingly or recklessly” caused them physical injury with his

¹Although Lona’s trial was conducted in January 2011, we cite the current version of the rule here, as it has undergone merely stylistic changes. *See* Ariz. R. Evid. 401 cmt. 2012.

vehicle. A.R.S. §§ 13-105(12), 13-1203(A)(1), 13-1204(A)(2).² A person acts recklessly if he or she “is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.” § 13-105(10)(c).

¶7 The state’s criminalist testified that her testing could only show that a drug had been “in the body at one time” and not exactly when the drug was ingested. She explained that a urine sample could test as positive for methamphetamine for anywhere from one to seven days after it was ingested. She also testified that the effects of methamphetamine could last from four to twelve hours, with withdrawal effects lasting for “days,” and would result in “the early phase” after use in the user feeling “euphoric, talkative, excited, [and] restless[.]” and in the late stage feeling “dysphoric,” “fatigued and tired.” And, methamphetamine use could cause a driver to drive at high speeds, inattentively, and erratically.

¶8 The criminalist’s testimony was not, however, the only evidence of methamphetamine use presented. An officer testified he had heard Lona telling a doctor that he had used methamphetamine three days before the offense. But, when the prosecutor asked the officer to refresh his recollection based on his report, he stated that he “remember[ed Lona] saying . . . he used meth in the last three days” and had written in

²Because the statutes are the same in relevant part as when Lona committed his offenses, we cite the current versions.

his report that Lona “had been using meth for the last three days.”³ Another officer testified he had observed needle marks on Lona’s arms, some of which appeared fresh. Thus, although evidence that there had been methamphetamine in Lona’s urine did not itself establish that he had been under the influence of the drug at the time of the offense, it did make that fact more likely, particularly when taken in conjunction with other evidence presented at trial, and was therefore relevant to establish whether Lona had been reckless. *See* Ariz. R. Evid. 401. In addition, the evidence was relevant to establish that if Lona had been unaware of the risk he had created, it was “solely by reason of voluntary intoxication.” § 13-105(10)(c).

¶9 Lona also suggests the evidence was unduly prejudicial and therefore should have been precluded pursuant to Rule 403, Ariz. R. Evid.⁴ But evidence is not unduly prejudicial merely because it is harmful. *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993). Rather, to be excluded as unduly prejudicial, evidence must have “‘an undue tendency to suggest decision on an improper basis’ . . . such as emotion, sympathy or horror.” *Id.*, quoting Fed. R. Evid. 403 Advisory Comm. Note. Viewing the evidence in the “‘light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect,’” as we must, *State v. Castro*, 163 Ariz. 465, 473,

³Lona focuses solely on trial testimony that he had ingested methamphetamine days before the offense, not on the day of the accident. But, we view the evidence in the light most favorable to upholding the convictions, *Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d at 670, and we will not reweigh it. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

⁴We cite the current version of the rule, which is materially the same as its predecessor. *See* Ariz. R. Evid. 403 cmt. 2012.

788 P.2d 1216, 1224 (App. 1989), quoting *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983) (emphasis omitted), we cannot say the trial court fundamentally erred in admitting the results of the urine analysis.⁵

Disposition

¶10 Lona's convictions and sentences are affirmed.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

⁵Lona also states: "Scientific evidence or testimony which is admitted at trial should not only be relevant, but reliable." But, he fails to develop any adequate argument on the question of reliability, and we therefore decline to address it. See Ariz. R. Crim. P. 31.13(c)(1)(vi); *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.